found to be most instructive—I find this tendency to be consistent with other areas of the law as well.

That said, I would like to thank the Committee for the opportunity to share my remarks with you, and I look forward to answering any questions that the Committee may have.

[The prepared statement of Mr. Sullivan appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Sullivan.

We now turn to Professor Amanda Frost, Assistant Professor of Law at American University's Washington College of Law. She is a graduate of Harvard College, 1993, with a bachelor's degree and a law degree from Harvard Law School in 1997. Her areas of specialization include civil procedure in Federal courts, and is the author of several Law Review articles. As staff attorney for the Public Citizen's Litigation Group, she has litigated cases before the U.S. Supreme Court and Federal Courts of Appeals. She was a consultant for the Shanghai Municipal Government in drafting open government legislation.

Thank you for being with us today, Professor Frost, and we will set the clock at 10 minutes for your testimony.

STATEMENT OF AMANDA FROST, ASSISTANT PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, D.C.

Ms. FROST. Thank you. Mr. Chairman, Senator Leahy and members of the Committee, I feel honored to have the opportunity to testify at these important proceedings. My comments today are about reforms that are needed, and the procedures and practices that govern recusal of Federal judges.

Your consideration of Judge Alito may be affected by your views about whether he should have recused himself from certain cases while sitting on the United States Court of Appeals for the Third Circuit. That is why I wanted to discuss with you today certain problematic recusal practices that too often have led Federal judges into situations into which their recusal decisions undermine the public faith in the judiciary.

Because the reputation of the judiciary is affected as much by the appearance as the reality of bias, Congress has enacted a statute, 28 USC section 455, that provides, "Any justice, judge or magistrate judge of the United States, shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." By using this language, Congress sought to ensure that even when a judge is certain that he or she could be impartial, that judge must step aside if members of the public might reasonably disagree.

In essence, the law requires a judge to recuse even in borderline cases in which the possibility of bias or appearance of bias is slight.

I think this is a good standard, but a key problem with the statute is that it contains no procedural mechanisms to govern the recusal decision. It does not say how the parties are to seek recusal, does not say how evidence about a judge's potential biases or conflicts are to be shared with the parties, does not clarify who should make the recusal decision, or whether that person should articulate any reasons for making that decision.

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So, for example, Supreme Court Justices recuse themselves in dozens of cases a year, and they almost never explain why they are doing so. When a party files a motion seeking a Justice's recusal, which is a rare event and something that most parties would be reluctant to do, there is no formal process through which the entire Court considers and decides that motion. Instead, it is sent to the one Justice whose impartiality is being questioned, and that Justice makes the decision on his or her own, often without explanation.

This procedural vacuum has, I believe, been the cause for recurring controversies over judges' failures to recuse, controversies that undermine the very goal of section 455 to protect the integrity of the judicial branch.

I want to give just a few examples of some of the recusal problems that have occurred over many years. In 1969, Supreme Court nominee Clement Haynsworth failed to be confirmed for that position, in part due to revelations that while sitting on the Fourth Circuit he had sat on a number of cases in which he had a small financial interest.

In 1972, then-Associate Justice William Rehnquist was criticized for sitting and hearing a case that he had commented on publicly while he was in the Department of Justice.

In 2004, most of us remember, Justice Scalia made a controversial decision not to recuse himself from a case in which Vice President Cheney was a party, despite having vacationed with the Vice President shortly after the Supreme Court had agreed to hear the case.

And then most recently, Judge Samuel Alito has been questioned by this Committee for his failure to recuse himself from a case in which Vanguard was a party, despite the fact that he owned mutual funds with Vanguard, and as stated in his 1990 Judiciary Committee questionnaire that he would recuse himself from all such cases.

What everyone's views are about whether the individual judges and Justices in these examples should have recused themselves—and I recognize there is differences of opinion on that—but whatever your views are, I think most would agree that the process by which that decision was made did not work to foster public confidence in the judiciary. These problems with the recusal law are particularly evident and disturbing at the Supreme Court level. When a district court judge or circuit court judge fails to recuse themselves, that decision may be reviewed by a higher court.

As I said, when a Supreme Court Justice faces a question of recusal, the Justice makes the decision on his or her own and there is obviously going to be no review of that decision. There is no higher court.

Furthermore, the stakes are simply that much higher at the Supreme Court, which hears the most divisive and important cases and which sets the law for the Nation.

Finally, the Supreme Court is the public face of the judiciary, and because of this, their recusal practices are more likely to have a negative effect on the public's perception of the Judiciary.

I propose a series of procedural reforms that could be made either by the Justices themselves in a rule, or by Congress, by

amending the recusal laws. First, there should be more transparency. Judges should be required to inform the parties and the public of any information that would be relevant to the recusal question. Even if they do not think recusal is required, the parties should be given full information, and the public as well.

Second, when judges do decide to recuse themselves, they should at least issue a brief explanation explaining why. That will provide a body of precedent to guide future litigants and judges facing these difficult recusal situations.

And third, when a judge does not decide or does not think it is clear that he should recuse himself, that judge should turn that decision over to his colleagues, or at the very least consult his colleagues, rather than make the decision on his own.

With these reforms in place, I think we would better protect both the reputation of the judiciary and of the judges who serve the public.

Thank you for inviting me to share my views with you today.

[The prepared statement of Ms. Frost appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Frost.

We now turn to Professor John Flym, professor of law at Northwestern. He has taught Professional Responsibility and Advanced Criminal Procedure. He served as counsel to Ms. Shantee Maharaj, the plaintiff in the 2002 case where Judge Alito ruled in favor of the Vanguard Mutual Fund. He got his bachelor's degree from Columbia in 1961 and his law degree from Harvard.

Thank you for agreeing to be a witness here today, Professor Flym, and we look forward to your testimony.

STATEMENT OF JOHN G.S. FLYM, RETIRED PROFESSOR OF LAW, NORTHEASTERN UNIVERSITY SCHOOL OF LAW, BOSTON, MASSACHUSETTS

Mr. FLYM. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I am honored to be before you today.

I would like to make one correction, if you please. It is a common error, but I have taught at Northeastern University, which is in Boston.

I am indeed the lawyer who challenged Judge Alito's failure to recuse in the *Monga* case, the *Monga/Vanguard* case.

What I would like to do now is to address three points, one of which was particularly addressed by Senator Hatch yesterday in his questioning of John Payton, the Eighth Federal Circuit representative. Does the law require Judge Alito to recuse given his investments in Vanguard?

Now, my colleague Amanda Frost addressed Provision (a) of the statute, which speaks in general terms and states the general principle based on the appearance. A judge shall recuse if someone could reasonably question the judge's impartiality. Section (b), however, is the applicable provision. Section (b) doesn't state a general proposition. It states a specific proposition. Among them (b)(4) says that a judge shall recuse if the judge has a financial interest in a party to the case. It then goes on in subsection (d) to define what "financial interest" means, and it says a financial interest means